78-551

No.



# In the Supreme Court of the United States

OCTOBER TERM, 1978

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UNITED STATES OF AMERICA, PETITIONER

*v.*

BODCAW COMPANY

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

## OPINION BELOW

The opinion of the court of appeals (App. A) is reported at 574 F.2d 238. The order and opinion of the district court (Apps. C and D) are unreported.

## JURISDICTION

The judgment of the court of appeals (App. B) was entered on June 1, 1978. On August 22, 1978,

Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and including September 29, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether a federal district court may award an owner of land taken in a federal condemnation proceeding the cost of appraising the land as an element of the just compensation guaranteed by the Fifth Amendment.

## CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the Constitution provides in pertinent part:

> nor shall private property be taken for public use, without just compensation.

## STATEMENT

The United States brought this condemnation action in connection with an Army Corps of Engineers flood control project in Caldwell Parish, Louisiana. The interest taken was a permanent easement in certain land owned by the respondent, Bodcaw Company. The government filed a declaration of taking on March 18, 1971, pursuant to the Declaration of Taking Act, 40 U.S.C. 258a, and deposited $99,650 with the clerk of the United States District Court for the Western District of Louisiana as the estimated just compensation for the taking (App. A, *infra*, at 1a-2a; C.A. App. 6-7).[1]

[1] "C.A. App." refers to the government's appendix in the court of appeals.



The issue of just compensation was tried to a jury. The government's expert witness appraised the value of the interest taken at $95,600; the landowner's two expert witnesses testified to values of $192,662 and $199,163, respectively (Tr. 112, 215, 549). The jury returned a verdict of $146,206 (App. A, *infra*, at 2a). On the landowner's motion, the district court awarded an additional $20,512.50 as reimbursement for appraisal costs and expert witness fees incurred by Bodcaw in the course of preparing for and conducting the litigation (*ibid.*). The United States appealed from the award of fees and costs.

A divided court of appeals affirmed in part and reversed in part. The court acknowledged that expert witness fees were litigation costs and hence could not be taxed against the United States in the absence of statutory authority. But the cost of preparing the appraisal reports that formed the basis of the experts' testimony did not, in the court's view, fall into the category of non-taxable costs. Instead, the court held that federal courts could exercise their equity powers to award, in appropriate cases, expenses of appraisal as part of the just compensation guaranteed by the Constitution.[2]

The court posited that "the central goal of just compensation [is] to place the landowner in as good a financial position as he would have been absent the taking of his property" (App. A, *infra*, at 5a). The court found in this case "unusual factual circum-

[2] "We conclude that the appraisal expenses in this case are part of the just compensation mandated by the Fifth Amendment * * *" (App. A, *infra*, at 2a).

stances and equitable considerations" that supported the award of appraisal expenses (*id.* at 6a). According to the court, the award was appropriate because "[t]he land taken by the Government was not of such character that accurate estimates of value easily could be made"; because the government had failed to conduct an on-site appraisal of the property until well after the suit was filed; and because the amount deposited by the government into the court registry—$99,650—was more than $45,000 less than the sum awarded by the jury (*id.* at 5a-6a). The court therefore concluded that the Bodcaw Company would not be "made whole for the Government's taking of its land if the large amount expended by it for appraisals in order to demonstrate the unfairness of the price offered by the United States is not considered an element of just compensation" (*id.* at 6a). Since the district court had included both witness fees and other appraisal expenses in the award, the court of appeals remanded the case for the district court to deduct from the judgment the amount of the award that was attributable to the appraisers' witness fees as distinguished from the other expenses of the appraisals (*id.* at 7a).

Judge Cowen of the Court of Claims, sitting by designation, dissented. He took issue with the majority's finding that this condemnation proceeding was unusual. In Judge Cowen's view, "[w]hat we have here is the rather typical, oft-recurring situation where the landowner is dissatisfied with the Government's valuation, employs an expert to appraise his land, and then utilizes the appraiser as



an expert witness in litigation for the purpose of attempting to persuade the court to increase the Government's valuation of the property" (App. A, *infra*, at 8a).

Judge Cowen deemed the court's distinction between appraisal fees and the appraisers' witness fees to be untenable. "The fee paid for the appraisal is an integral part of the litigation expenses as fully as services performed by an attorney in preparation for a trial, or the examination of books and records by an accountant in preparation for his testimony in court on accounting issues" (App. A, *infra*, at 9a). Inasmuch as this Court in *Dohany* v. *Rogers*, 281 U.S. 362, 368 (1930), established the rule that attorneys' fees and other expenses incurred by a condemnee are not included in the just compensation required by the Fifth Amendment, Judge Cowen would have disallowed the appraisal fees as well as the appraisers' witness fees.[3]

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[3] Judge Cowen distinguished the Fifth Circuit decision in *United States* v. *Lee*, 360 F.2d 449 (5th Cir. 1966), on which the majority relied heavily. In *Lee*, the government had underestimated the acreage it was taking, had refused the landowner's request that it conduct a survey to determine the amount involved, and had forced the landowner to conduct his own survey to establish the amount of acreage condemned—which proved to be 82 acres more than the government had estimated. In those circumstances, the court held that the government should be required to pay for the survey. It justified this result on the basis that the burden is on the condemnor to establish the amount of land being taken, and the government had sought to shift to the landowner the expense of meeting that burden. *Id.* at 452. By contrast, the landowner bears the burden of proving the value of the property being condemned. *United States ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266, 273 (1943).

In addition, Judge Cowen noted that Congress has authorized the awarding of litigation expenses against the United States in condemnation cases, but only in very limited circumstances that are not applicable here. In Section 304(a) of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Uniform Relocation Act), 42 U.S.C. 4654(a), Congress provided that reimbursement for litigation expenses, "including reasonable attorney, appraisal, and engineering fees," shall be awarded to the condemnee, but only if the condemnation proceeding is abandoned by the United States or if the final judgment is that the federal agency cannot acquire the property by condemnation. That statute, Judge Cowen concluded, "should be construed as creating only a narrow exception to the general rule which forbids the recovery of appraisal fees and expenses incurred by the owner, it being the purpose of Congress to discourage litigation in Federal condemnation proceedings" (App. A, *infra*, at 11a).

## REASONS FOR GRANTING THE PETITION

1. The decision of the court of appeals is contrary to this Court's decision in *Dohany* v. *Rogers*, 281 U.S. 362 (1930).

In *Dohany*, a landowner sought to enjoin state highway officials from acquiring a right-of-way across his land for the relocation of a railroad displaced by a state highway project. The officials had brought the condemnation proceeding under the state's highway condemnation statute instead of the special statutory provisions governing condemnation of property



by a railroad for railroad use. The railway condemnation statute accorded special benefits to the condemnee, including the right to an award of attorneys' fees and expenses (*id.* at 365). The highway condemnation statute provided none of these special benefits. The landowner claimed that the denial of attorneys' fees and expenses under the highway condemnation statute would deprive him of due process, equal protection, and just compensation for the property taken (281 U.S. at 366).

The Court rejected the landowner's contentions. In response to the due process and equal protection claims, the Court held that due process does not guarantee any particular form of proceeding and that equal protection does not bar the state from distinguishing between condemnation suits brought by the state and those brought by a private party (*id.* at 369). In response to the just compensation claim, the Court held that "[a]ttorneys' fees and expenses are not embraced within just compensation for land taken by eminent domain" (*id.* at 368).

The holding in *Dohany* that expenses are not part of the just compensation required by the Fifth Amendment has been followed routinely, both in the federal courts[4] and in state court decisions interpreting the

[4] *E.g., Richmond Elks Hall Association* v. *Richmond Redevelopment Agency*, 561 F.2d 1327, 1333 (9th Cir. 1977); *United States* v. *4.18 Acres of Land*, 542 F.2d 786, 788 (9th Cir. 1976); *Rocca* v. *United States*, 500 F.2d 492, 496 (Ct. Cl. 1974); *United States* v. *Certain Land at Irving Place and 16th Street*, 415 F.2d 265, 272, as amended, 420 F.2d 370 (2d Cir. 1969); *United States* v. *2,353.28 Acres in Brevard and Volusia Counties, Florida*, 414 F.2d 965, 972 (5th Cir. 1969);

Just Compensation Clause of the Fifth Amendment.[5] The ruling of the court in this case—that appraisal expenses may be included as an element of the just

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*United States* v. *431.60 Acres in Richmond County, Georgia,* 355 F. Supp. 1093, 1096 (S.D. Ga. 1973); *United States* v. *23.94 Acres of Land,* 325 F. Supp. 330, 332 (W.D. Va. 1970); *United States* v. *15.3 Acres of Land,* 158 F. Supp. 122, 125 (M.D. Pa. 1957); *Contra, United States* v. *71.29 Acres of Land,* 376 F. Supp. 1221 (W.D. La. 1974) (a prior decision from the same district court that awarded litigation expenses in this case, apparently relying in part on the Louisiana statutory provision for awarding litigation expenses as part of the costs awarded to the condemnee under Louisiana law).

[5] *E.g., White* v. *State,* 319 So. 2d 247 (Ala. 1975); *State* v. *McDonald,* 88 Ariz. 1, 13-14, 352 P.2d 343, 351 (1960); *County of Los Angeles* v. *Ortiz,* 6 Cal. 3d 141, 98 Cal. Rptr. 454, 490 P.2d 1142 (1971); *9.88 Acres of Land* v. *State,* 274 A.2d 139, 141 (Del. 1971); *Bowers* v. *Fulton County,* 227 Ga. 814, 183 S.E.2d 347 (1971); *State* v. *Davis,* 53 Haw. 582, 499 P.2d 663 (1972); *Peel* v. *Burk,* 197 N.W.2d 617, 619 (Iowa 1972); *Schwartz* v. *Western Power & Gas Co.,* 208 Kan. 844, 852, 494 P.2d 1113, 1116-1117 (1972); *Department of Conservation* v. *Connor,* 316 Mich. 565, 582, 25 N.W.2d 619, 625 (1947); *State* v. *Miller Home Development, Inc.,* 65 N.W.2d 900 (Minn. 1954); *Manchester Housing Authority* v. *Belcourt,* 111 N.H. 367, 369, 285 A.2d 364, 365 (1971); *North America Realty Co.* v. *City of Milwaukee,* 189 Wis. 585, 208 N.W. 489 (1926); *State* v. *Mandis,* 119 N.J. Super. 59, 290 A.2d 154 (1972).

In *Dade County* v. *Brigham,* 47 So.2d 602 (Fla. 1950), the Florida Supreme Court held that litigation expenses may be assessed against the condemnor. Although the court wrote broadly, the decision ultimately rested not on the federal Constitution but on a state statute, construed in light of the Just Compensation Clause of the Florida Constitution. See also *Stewart & Grindle, Inc.* v. *State,* 524 P.2d 1242 (Alaska 1974) (construing an Alaska rule of eminent domain procedure to include recovery for the condemnee's litigation expenses, see *id.* at 1250 n.31).



compensation mandated by the Fifth Amendment—is thus in conflict with the nearly uniform rule adopted by both state and federal courts.[6]

2. If the decision below is allowed to stand, its impact on federal land acquisition litigation is likely to be substantial. Contrary to the court's characterization, this condemnation proceeding is not notably different from the vast majority of litigated condemnation suits. Only a small percentage of federal land acquisitions result in fully litigated condemnation actions.[7] The litigated cases are, generally speaking, those in which the property taken is not easy to value accurately and in which there is conse-

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[6] The rule has been stated: "The constitutional mandate of just compensation does not require reimbursement of an owner for his attorney's fees and other litigation expenses in defending a condemnation proceeding." 7 J. Moore, *Federal Practice,* ¶ 71 A.130[3], at 71A-623 (2d ed. 1978), citing *Dohany.*

[7] Approximately 85 percent of the land acquired by the United States for all purposes is purchased from the owners without recourse to condemnation proceedings. See House Select Subcommittee on Real Property Acquisition, *Study of Compensation and Assistance for Persons Affected by Real Property Acquisition in Federal and Federally Assisted Programs,* Committee Print No. 31, 88th Cong., 2d Sess. 44 (1965). With respect to the remaining 15 percent, as to which condemnation actions are initiated, approximately 80 percent of those actions are settled before trial. *Id.* at 46.

The number of condemnation actions is significant, however, in relation to district court dockets. At the end of statistical year 1977, with partial implementation of new guidelines recommended by the Judicial Conference of the United States for docketing and record-keeping in condemnation actions (see *Report of the Proceedings of the Judicial Conference of the United States, March 6-7, 1975,* at 9-10), there were 4,444 pending condemnation actions in the district courts, represent-

quently a significant difference of opinion concerning the amount of compensation due. In such cases the expert witnesses called by the parties regularly testify to widely different values for the property, and the fact-finder normally concludes that just compensation is an amount falling between the estimates. *E.g.*, *United States* v. *46,672.96 Acres in Dona Ana County, New Mexico*, 521 F.2d 13 (10th Cir. 1975); *United States* v. *Corbin*, 423 F.2d 821, 829 (10th Cir. 1970); *United States* v. *Coughlin*, 405 F. Supp. 13 (D. Ore. 1975); *United States* v. *2,457.85 Acres in Yazoo and Holmes County (Yazoo Headwaters)*, 303 F. Supp. 883 (S.D. Miss. 1969).[8]

Correspondingly, experts hired by the parties routinely prepare appraisal reports on the property, for purposes both of negotiation and of trial. See 7 P. Nichols, *Eminent Domain*, Section 4.01 *et seq.* (Rev. 3d ed. 1977); see also Judge Cowen's dissent, App. A, *infra*, at 8a. The government is required by statute to "make every reasonable effort to acquire expeditiously real property by negotiation" rather

ing 2.9 percent of the pending civil actions. Annual Report of the Director of the Administrative Office of the United States Courts 209-210 (1977). The numbers and proportions of pending condemnation actions on the dockets of individual district courts are often substantial. Thus, 45 percent of all pending civil actions in the Southern District of Florida were condemnation proceedings, as were 24 percent in the Southern District of California and 12 percent in the Western District of Missouri. In contrast, other district courts had none. *Id.* at 326-330.

[8] In this case, the jury's award of $146,206 fell almost exactly midway between the government appraiser's estimate of $95,600 and the estimates of $192,662 and $199,163 given by Bodcaw's appraisers.



than by litigation (42 U.S.C. 4651(1)), and it is required to appraise the property before it initiates negotiations for purchase (42 U.S.C. 4651(2)). Because, as in this case, the pre-negotiation appraisal is conducted long before trial, and because pretrial rulings in the case often alter the assumptions on which the initial appraisal is made, the government often finds it necessary to conduct a second appraisal shortly before trial. Meanwhile, the landowner is unlikely to have a recent appraisal of his property that is appropriate for trial purposes. Consequently, unless the government's initial deposit of estimated compensation is acceptable, the landowner routinely engages his own appraiser to prepare for negotiation and possible trial.

Thus, the circumstances that the court of appeals found sufficiently "unusual" to sustain an award of appraisal expenses in this case—a difficult-to-value property interest, a substantial increase in the amount awarded over the government's initial estimate and deposit, and reliance by the government on an appraisal made shortly before the trial (App. A, *infra*, at 6a)—are in fact present in a great many litigated condemnation cases.

Aside from attorneys' fees, appraisal expenses are usually the largest litigation cost incurred by condemnees in eminent domain cases.[9] If the ruling of the court of appeals stands, condemnees are likely to

[9] In this case, pursuant to the order of the court of appeals, Bodcaw has submitted affidavits claiming that of the $20,512.50 at issue, only $2,025 is attributable to the appraisers' fees for testifying at trial. The rest is attributed to preparation of the appraisal reports.

claim reimbursement of such expenses in almost every case.[10] In response, the government will be forced to proffer additional evidence concerning the offers it made to purchase the property,[11] the history of the appraisals made by the government, and perhaps even expert testimony on the reasonableness of the government's valuation.

Even with such additional evidence, it is not clear from the court's opinion what combination of circumstances should be deemed sufficiently "unusual" to authorize the award of appraisal fees. It is difficult to draw workable standards from the court's suggestion that "unusual factual circumstances and

[10] The district court for the Western District of Louisiana, the same court that tried the present case, has, since the decision of the Fifth Circuit, indicated that it will allow the landowner appraisal costs in *United States* v. *5,553.80 Acres in Concordia Parish, La. (Angelina Plantation Farm)* (W.D. La., No. 77-0441 (June 23, 1978)).

[11] The majority of the court of appeals made the unwarranted assumption that the amount of the registry deposit was the maximum amount offered by the government to purchase the property (App. A, *infra*, at 6a). The registry deposit was the amount of the initial appraisal of the property. Federal agencies often offer more than appraised value to purchase property to avoid the expense of litigation. See *WMATA* v. *One Parcel of Land*, 548 F.2d 1130, 1131 (4th Cir. 1977). The government is precluded by statute from offering less than the appraised value. 42 U.S.C. 4651(3). Offers to purchase, however, are not admissible evidence in the proceedings to determine just compensation (Rule 408, F. R. Evid.), and often do not otherwise appear in the court record of the case. There is nothing in the record in this case that reflects the amount, above the registry deposit, that was offered by the government to purchase the Bodcaw property.



equitable considerations" (App. A, *infra*, at 6a) should be determinative. While the majority found the present case unusual, Judge Cowen, in dissent, found it "rather typical" (*id.* at 8a). This difference of opinion points up the problems of leaving to the trial court's discretion, unguided by legislative mandate, the task of picking and choosing those condemnation cases in which it is "equitable" to award appraisal expenses. In effect, the court of appeals has conferred on the district courts the authority to allow appraisal costs "whenever the courts might deem them warranted." *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 260 (1975).

3. Beyond its departure from established precedent on the issue of whether appraisal fees can be charged against the condemnor in the absence of statutory authority, the decision of the court of appeals reflects a fundamental misconception of the scope of the Just Compensation Clause of the Fifth Amendment.

The rationale of the court's decision was that an award of appraisal costs was necessary to make the Bodcaw Company whole (App. A, *infra*, at 6a):

> Under the facts of this case, we cannot conclude that the Bodcaw Company has been made whole for the Government's taking of its land if the large amount expended by it for appraisals in order to demonstrate the unfairness of the price offered by the United States is not considered an element of just compensation * * *.

Just compensation in the constitutional sense, however, "is for the property and not to the owner." *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 326 (1893). The traditional definition of the measure of just compensation guaranteed by the Fifth Amendment is "the full monetary equivalent of the property taken." *United States* v. *Reynolds*, 397 U.S. 14, 16 (1970); *United States* v. *Miller*, 317 U.S. 369, 373 (1943); *Phelps* v. *United States*, 274 U.S. 341, 344 (1927). This definition excludes incidental and consequential losses that may be incurred by the owner in the course of condemnation litigation or otherwise. See *Mitchell* v. *United States*, 267 U.S. 341, 345 (1925) (destruction of an ongoing business); *United States ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266, 281 (1943) (frustration of plans); *United States* v. *Petty Motor Co.*, 327 U.S. 327, 377 (1946) (expenses of relocation). The owner is to be put into as good a position pecuniarily as if his property had not been taken, but only in the sense that he must receive the full and fair market value of the property interest taken at the time of the taking. *United States* v. *General Motors Corp.*, 323 U.S. 373, 379 (1945); see *Olson* v. *United States*, 292 U.S. 246, 255 (1934).

The decision in this case contravenes these principles. Rather than determining what award was required to compensate the Bodcaw Company for the property taken, the court of appeals considered what was required to compensate Bodcaw for the losses and expenses associated with the entire condemnation proceeding. But the expenses of the condemnation



litigation, such as the appraisal fees in this case, cannot be included in the measure of just compensation without substantially broadening the traditional meaning of the constitutional guarantee.

Moreover, to include appraisal fees as part of just compensation in some cases and not in others, as the court has ruled, offends the purpose and the integrity of the Fifth Amendment's guarantee. The amount that is constitutionally required to compensate the owner for the property taken does not depend on the circumstances of the litigation, the history of negotiations between the parties, or the difficulty of proving the value of the property. The meaning of "just compensation" does not vary according to the court's judgment of the reasonableness of the government's conduct in negotiating for the property, or the problems or expenses encountered by the landowner in trying to maximize his recovery in the condemnation proceeding. *Cf. United States* v. *Petty Motor Co.*, *supra*, 327 U.S. at 377-378; *Olson* v. *United States*, *supra*, 292 U.S. at 255-256.

Furthermore, if appraisal fees are part of the constitutionally required "just compensation," it is difficult to understand, as Judge Cowen noted, how witness fees can be excluded. It is not enough to say, as the court did, that witness fees have traditionally been viewed as non-compensable costs (App. A, *infra*, at 7a). For if appraisal fees must be reimbursed as a matter of constitutional compulsion, the Constitution would equally require the payment of witness fees, notwithstanding any statutory rule

or common-law tradition to the contrary. See *United States* v. *Cors*, 337 U.S. 325, 331 (1949); *Monongohela Navigation Co.* v. *United States*, *supra*, 148 U.S. at 327-328.

Congress, of course, has authority to provide for payments to landowners beyond those required by the Constitution. *United States* v. *Willow River Co.*, 324 U.S. 499, 510 (1945); *Mitchell* v. *United States*, *supra*, 267 U.S. at 345-346; see *United States* v. *Realty Co.*, 163 U.S. 427, 440-441 (1896). Congress has recently exercised this power, in a limited fashion, in the Uniform Relocation Act of 1970, 42 U.S.C. 4601 *et seq.* That Act provides for the payment of moving expenses, business and residential relocation expenses, land transfer costs and other incidental costs incurred by owners of property taken by the government.

In enacting the Uniform Relocation Act, Congress considered and rejected the allowance of appraisal fees in most condemnation actions. Section 304 of the Act, 42 U.S. 4654, provides for payment of attorneys' fees, appraisal and engineering fees, and other litigation costs in a few narrowly circumscribed situations. See *United States* v. *4.18 Acres of Idaho County, Idaho*, 542 F.2d 786 (9th Cir. 1976). Payment of such fees is authorized under Section 304 only when the government abandons a condemnation suit, when the court rules that the government cannot acquire the property by condemnation, or when the landowner is forced to file suit for just compensation in the Court of Claims. See *Rocca* v. *United States*,



500 F.2d 492 (Ct. Cl. 1974). Congress considered and rejected requiring the reimbursement of litigation expenses, including appraisal fees, in all federal condemnation actions, and expressed the understanding that such expenses are not recoverable in the absence of specific statutory authorization. The House Report on the Act stated (H.R. Rep. No. 91-1656, 91st Cong., 2d Sess. 25 (1970):

> Ordinarily the Government should not be required to pay expenses incurred by property owners in connection with condemnation proceedings. The invitation to increased litigation is evident.

If any change is to be made in allocating the costs and expenses of litigation in condemnation actions, it should be made by Congress, not by the judiciary. It particularly should not be made in the form of a broad, loosely defined equitable power conferred on the district courts as a matter of constitutional mandate.[12] The considerations bearing on the allocation

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[12] If appraisal fees and other litigation costs are to be compensated, it has been suggested that the compensation should be restricted to certain limited and well-defined circumstances. For example, the Uniform Eminent Domain Code authorizes payment of a limited amount of litigation expenses if the fact-finder's award is in excess of the condemnor's last offer to settle. Uniform Eminent Domain Code, Section 1205(b), in *Handbook of the National Conference of Commissioners on Uniform State Laws* (1974). The Code also recommends withholding ordinarily taxable costs from the landowner when the award falls short of the condemnor's last offer. See Section 1205(c). See generally Ayer, *Allocating the Costs of Determining "Just Compensation,"* 21 Stan. L. Rev. 693, 717 (1969).

of such costs are complex, and the *ad hoc* exercise of discretion by trial courts is not apt to serve the interest of predictability in an area where that interest is important.[13] *Cf. F. D. Rich Co.* v. *Industrial Lumber Co.*, 417 U.S. 116, 126-131 (1974). As this Court stated in the analogous context of attorneys' fee awards, the circumstances under which such awards should be made "and the range of discretion of the

[13] As the House Committee Report on the Uniform Relocation Act noted (H.R. Rep. No. 91-1656, *supra*, at 25), a significant alteration in the established principles of allocation of litigation costs in condemnation actions would be likely to decrease the settlement rate. After the Florida Supreme Court held that appraisal fees were included within just compensation (see note 5, *supra*), the effect on condemnation litigation in that State was described as follows:

> The first consequence * * * was a sharp reduction in the ratio of properties acquired by purchase, from over 90 percent before 1950, to less than 20 percent by 1957. This, in turn, led in one instance to a jury trial involving 90 parcels of land owned by different defendants represented by 29 attorneys before one judge and jury for the right-of-way for one road. Two other similar trials were required for the right-of-way for this particular road.
>
> * * * * *
>
> In a small north Florida county, where the court in the interest of justice elected to order separate trials, the volume of eminent domain litigation soon occupied one-third of the entire trial docket with resultant delay to all litigation. * * * [footnotes omitted]

T. Britton, *Effect in Florida of Requiring the Condemnor to Pay Condemnee's Entire Litigation Expense*, Right-of-Way 15-16 (October 1963).



courts in making those awards are matters for Congress to determine." *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240, 262 (1975).[14]

## CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

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SEPTEMBER 1978

[14] In a particularly apposite passage in *Alyeska*, this Court noted (421 U.S. at 269):

> [the] courts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party in federal litigation or to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the courts' assessment of the importance of the public policies involved in particular cases.

## APPENDIX A

## UNITED STATES COURT OF APPEALS
## FIFTH CIRCUIT

No. 75-2328

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLANT CROSS-APPELLEE

*v.*

1,380.09 ACRES OF LAND, MORE OR LESS, SITUATED IN CALDWELL PARISH, STATE OF LOUISIANA, ET AL. and UNKNOWN OWNERS, DEFENDANTS

BODCAW COMPANY, DEFENDANT-APPELLEE
CROSS-APPELLANT

June 1, 1978

*Appeals from the United States District Court for the Western District of Louisiana*

Before COWEN *, GOLDBERG and AINSWORTH, Circuit Judges

AINSWORTH, Circuit Judge:

The United States brought a proceeding to condemn land owned by the Bodcaw Company, and deposited $99,650 in the court registry as the estimated just compensation for the taking. The Bodcaw Company responded that the amount tendered by the

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* Senior Judge of the United States Court of Claims, sitting by designation.

Government was inadequate, and also sought compensation for the expenses of appraising the land and for expert witness fees. A jury trial resulted in an award in favor of the Bodcaw Company for $146,206 as the value of the land, and $20,512.50 was granted to reimburse the appraisal and expert witness expenses incurred by the company. The Government contends that the award of appraisal and expert witness fees is not authorized either by statute or by the Fifth Amendment. We conclude that the appraisal expenses in this case are part of the just compensation mandated by the Fifth Amendment,[1] but that the expert witness fees are not compensable, and therefore remand for an allocation of the $20,512.50 between appraisal and expert witness fees, and entry of an appropriate judgment.

The sole issue is whether the appraisal and expert witness fees are elements of just compensation, or whether such expenses are better characterized as "costs" which cannot be taxed against the United States in this condemnation proceeding.[2] Thus, our

[1] The Fifth Amendment to the United States Constitution reads in part: "nor shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

[2] Without an authorizing statute, costs cannot be assessed against the United States. *See United States* v. *4.18 Acres of Land*, 9 Cir., 1976, 542 F.2d 786, 788. However, 42 U.S.C. § 4654(a) provides that

> (a) The Federal court having jurisdiction of a proceeding instituted by a Federal agency to acquire real property by condemnation shall award the owner of any right, or title to, or interest in, such real property such sum as will in the opinion of the court reimburse such owner for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of the condemnation proceedings, if—
>
> (1) the final judgment is that the Federal agency cannot acquire the real property by condemnation; or
>
> (2) the proceeding is abandoned by the United States.



function under the circumstances here is to interpret the Fifth Amendment, not to construe a federal statute.

It is well settled that attorneys' fees and court costs are not part of just compensation, *see, e.g.*, *United States* v. *2,353.28 Acres of Land*, 5 Cir., 1969, 414 F.2d 965, 972, and cannot, with limited exceptions, be taxed to the Government in condemnation cases.[3] However, not every expense incurred in connection with a condemnation proceeding is a noncompensable "cost." *See United States* v. *Lee*, 5 Cir., 1966, 360 F.2d 449. In *Lee* the Government described a tract of land by metes and bounds, but underestimated the acreage. The landowner complained that the estimated acreage was less than the amount stated on his deeds. Nevertheless, the Government refused to survey the tract, and the landowner then conducted a survey which confirmed his suspicion that the size of his property had been underestimated. The Fifth Circuit noted the special need for an independent sur-

[3] *See* 42 U.S.C. § 4654(a), at note 2 *supra*.

vey in that case, as the landowner had several deeds to the property, on which the stated acreage of the tract varied. The court recognized the validity of the general proposition that costs cannot be taxed to the United States in condemnation proceedings, but determined that the expense of surveying the land to determine the actual acreage was not such a cost. In explaining its decision, the court stated that

> "'[j]ust compensation' invokes the equitable powers of the court, and courts must use their equity powers to put an owner of land being condemned in as good position as he would have been if his property had not been taken . . . ." *Id.* at 452.

In concluding, the court emphasized that it was not holding that every survey undertaken by a landowner faced with condemnation must be paid by the Government, but only that compensation was equitable under the facts of that case.[4]

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[4] *Lee* has been noted by this court on three occasions. In *Henning* v. *Lake Charles Harbor & Terminal Dist.*, 5 Cir., 1968, 387 F.2d 264, a state agency sought to condemn certain property, and the proceedings were removed to federal court. The district court allowed the landowners $5,400 as reasonable compensation for the expenses of consulting geologists, engineers and appraisers, relying on the rationale of *Lee*. The Fifth Circuit court affirmed the $5,400 award on the basis of Louisiana law, noting that this decision did not "intimate any opinion as to what the rights of these property owners might be in this regard under the Fourteenth Amendment." *Id.* at 267. *Lee* was cited for the proposition that just compensation depends on the facts of each particular case in both *United States* v. *161.99 Acres of Land*, 5 Cir., 1975, 512 F.2d 65, 66, and *Porter* v. *United States*, 5 Cir., 1973, 473 F.2d 1329, 1334.

In *United States* v. *71.29 Acres of Land*, W.D. La., 1974, 376 F.Supp. 1221, 1227, the district court allowed compensation for "costs, fees, and expenses paid to independent, professional appraisers," relying on *Lee* and *Henning*. The district court noted the *Lee* court's emphasis on the role of equitable considerations in determining the aprropriate amount of just compensation. *Id.*



The critical question is whether *Lee*'s reasoning in regard to survey expenses applies to the appraisal costs incurred in this case. The court in *Lee* emphasized that the determination of just compensation was equitable in nature, and was therefore dependent on the factual context and equities of each case. In addition, the *Lee* court stated that the central goal of just compensation was to place the landowner in as good a financial position as he would have been absent the taking of his property. These factors are equally present in this case. The land taken by the Government was not of such character that accurate estimates of value easily could be made.[5] Instead, the property taken stretched in a very narrow strip for miles along the bank of a waterway, and had not recently been appraised. The Government made no effort to conduct an on-site appraisal until 1974, nearly three years after this suit was filed and the

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[5] J. W. Bowen, an appraiser who testified for the Government, admitted that "[t]his type of property, and by virtue of its size, sir, is almost an impossibility to appraise on the straight market data approach, which is the most accepted method in the courts for appraisals."

original $99,650 estimate deposited in the court registry. The $99,650 offered by the United States was nearly $45,000 less than the sum actually awarded by the jury. Thus, the factors stressed by the court in *Lee*—unusual factual circumstances and equitable considerations—support the award of appraisal expenses here. Under the facts of this case, we cannot conclude that the Bodcaw Company has been made whole for the Government's taking of its land if the large amount expended by it for appraisals in order to demonstrate the unfairness of the price offered by the United States is not considered an element of just compensation. The noncompensability of attorney's fees and court costs does not require a holding that every analogous expense is noncompensable. In determining just compensation in condemnation cases, our central concern is to do justice, and in this case we find that justice and equity support the award of appraisal fees.[6] However, this court has previously recognized that expert witness fees are viewed as costs. *See, e.g., Henning* v. *Lake Charles Harbor & Terminal District*, 5 Cir., 1968, 387 F.2d 264, 267 ("United States District Courts have no authority to tax costs for compensation to expert witnesses in ex-

[6] *United States* v. *4.18 Acres of Land*, 9 Cir., 1976, 542 F.2d 786, and other cases relied on by the Government, are not to the contrary. In *4.18 Acres of Land*, the Ninth Circuit rejected the landowners' demand for attorneys' fees and expenses. No specific reference was made to appraisal fees, and therefore the court's references to the policy of not encouraging litigation must, therefore, be viewed in light of the fact that attorney's fees and expenses were the issue in that case.



cess of the statutory . . . allowance.")[7] Witness fees are included as "costs" under 28 U.S.C. § 1920(3). Since we accept the *Lee* court's distinction between expenses that are "costs" and those that are "part of the just compensation contemplated under the Constitution," 360 F.2d at 452, we conclude that the traditional identification of expert witness fees with the costs of litigation indicates that such expenses should not be considered compensable in this condemnation proceeding. We therefore remand the case to the district court to determine the amount of expenses attributable to expert witness fees, to deduct this amount from the award, and to enter an appropriate judgment for the balance.

AFFIRMED in part, REVERSED in part, and REMANDED.

[7] The *Henning* court relied on *Kirby Lumber Corp.* v. *Louisiana*, 5 Cir., 1961, 293 F.2d 82, where the court flatly stated that expert witness fees "are never allowed in condemnation cases in Federal Courts." *Id.* at 87. Nevertheless, *Henning* allowed expert witness fees in a condemnation case. The *Henning* court observed that the Louisiana Supreme Court had held expert witness fees to be part of just compensation under the Louisiana Constitution. The court in *Henning* concluded that this was a substantive requirement of Louisiana law, and that the federal court was bound to apply the state law. Insofar as *Henning* applies state law to a state condemnation, it is directly at odds with the terse comment in *Kirby Lumber* that expert witness fees cannot be recovered in federal courts, as *Kirby Lumber* was also a Louisiana state condemnation case. In any event, neither case is dispositive on the issue of federal constitutional law that is presently before us.

COWEN, Senior Judge, concurring in part and dissenting in part:

Although I concur in all other parts of the court's decision, I cannot agree that the condemnee is entitled to recover the amount expended for an appraisal of its land as a part of just compensation. The majority bases its decision largely on *United States* v. *Lee*, 360 F.2d 449 (5th Cir. 1966). In reaching a contrary conclusion, I need not disagree with that decision. Rather, I would limit its application narrowly to the peculiar facts which I think led the court to reach its result in that case. As the majority has noted, the circumstances in *Lee* were unusual. The Government's declaration of taking described the land by metes and bounds but underestimated the acreage. The landowner complained and asked the Corps of Engineers to make a survey to determine the amount of land involved. The Government refused and informed the owner that he would have to furnish the survey himself. He did so, and the Government later stipulated that the tract actually contained 1,182.06 acres, whereas it had previously contended that there were only 1,100 acres therein.

The facts before us are wholly different. What we have here is the rather typical, oft-recurring situation where the landowner is dissatisfied with the Government's valuation, employs an expert to appraise his land, and then utilizes the appraiser as an expert witness in litigation for the purpose of attempting to persuade the court to increase the Government's valuation of the property. The majority



recognizes that the fee paid the appraiser as an expert witness is not recoverable and has reversed the district court on that point. Nevertheless, the majority separates the appraisal fee from the other amounts paid the appraiser, classifies the fee as a non-litigation expense, and declares that it is recoverable as a part of just compensation. In my opinion, the distinction is untenable. The fee paid for the appraisal is an integral part of the litigation expenses as fully as services performed by an attorney in preparation for a trial, or the examination of books and records by an accountant in preparation for his testimony in court on accounting issues. Yet, I feel confident that the majority would readily agree that no part of the attorney's or accountant's fees would be recoverable in a Federal condemnation action.

Ever since the Supreme Court handed down its decision in *Dohany* v. *Rogers*, 281 U.S. 362, 50 S.Ct. 299, 74 L.Ed. 904 (1930), this court and other courts have held that attorneys' fees and other expenses incurred by the condemnee are not embraced within the concept of "just compensation for land taken by eminent domain." *United States* v. *2,353.28 Acres of Land, etc., State of Fla.*, 414 F.2d 965, 972 (5th Cir. 1969). In the absence of an authorizing statute, courts may not award a judgment against the United States for costs or other litigation expenses. *United States* v. *Worley*, 281 U.S. 339, 344, 50 S.Ct. 291, 74 L.Ed. 887 (1930); *United States* v. *23.94 Acres of Land, Floyd Co., Com. of Va.*, 325 F.Supp. 330 (W.D. Va. 1970).

There is ample authority for the proposition that the 1966 amendment of 28 U.S.C. § 2412 which authorizes the awarding of costs to the prevailing party in litigation involving the United States, is not applicable in condemnation proceedings. *United States ex rel. T. V. A.* v. *Easement & Right-of-Way*, 452 F.2d 729 (6th Cir. 1971), and cases cited therein. No contention to the contrary has been made in this case. *Henning* v. *Lake Charles Harbor and Terminal District*, 387 F.2d 264 (5th Cir. 1968), relied upon by the condemnee, is obviously inapposite. It involves a state condemnation action and the application of Louisiana law, which authorizes the recovery of appraisal fees as costs, rather than as a part of just compensation, in such actions. *United States* v. *71.29 Acres of Land*, 376 F.Supp. 1221 (W.D. La. 1974), also relied on by the condemnee, is a Federal condemnation case. The court there based its decision on and quoted from *Henning*, and declared that the landowners were entitled to recover the fees paid to appraisers as costs "especially under the applicable Louisiana law, as followed by the Fifth Circuit [in *Henning*] relative to taking of Louisiana property." Thus the district court, in following *Henning*, treated the fees paid the appraisers as litigation costs and permitted the landowners to recover such costs by applying Louisiana law rather than Federal law.

When section 304 of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4654(a) was enacted, Congress made an exception to the long-established rule that



the appraisal fees and other expenses incurred by the owner because of condemnation proceedings may not be included in an award against the United States. The statute, Pub.L. 91-646, provides that reimbursement for such expenses shall be awarded to the condemnee only if:

(1) The final judgment is that the Federal agency cannot acquire the real property by condemnation or,

(2) The proceeding is abandoned by the United States.

Neither of these conditions is met in this case.

As the Ninth Circuit has explained in *United States* v. *4.18 Acres of Land, etc.*, 542 F.2d 786, 788 (1976), Congress intended that section 4654(a) should be construed as creating only a narrow exception to the general rule which forbids the recovery of appraisal fees and expenses incurred by the owner, it being the purpose of Congress to discourage litigation in Federal condemnation proceedings. This holding is supported by the following statement in H.Rep. 91-1656, 91st Cong. 2d Sess., (3 *U.S. Code Cong. and Admin. News*, p. 5875 (1970)):

> Ordinarily the Government should not be required to pay expenses incurred by property owners in connection with condemnation proceedings. The invitation to increased litigation is evident.

The majority has emphasized the fact that on account of its size, it was very difficult to appraise the value of the property taken on the basis of available

market data. This is not an unusual situation. It is common knowledge that in many condemnation cases, there have been no recent sales of comparable properties. Other methods, including the use of expert testimony, must be used frequently to ascertain the fair market value.

Under the court's holding today, when a condemnation proceeding is hereafter instituted in the Fifth Circuit, the condemnee may employ an expert to appraise his land, utilize the appraiser as an expert witness in litigating the valuation issue, and if no market data on sales of comparable property are available, he may recover the fee paid for the appraisal as an element of just compensation. In my opinion, such a result is contrary to the rule which the courts have followed since *Dohany* v. *Rogers*, *supra*, was handed down by the Supreme Court and is also in direct conflict with what Congress intended when it enacted Pub.L. 91-646, now codified as 42 U.S.C. § 4654(a).



**APPENDIX B**

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 75-2328

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D. C. Docket No. CA 16,596

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLANT CROSS-APPELLEE

*v.*

1,380.09 ACRES OF LAND, MORE OR LESS, SITUATED IN CALDWELL PARISH, STATE OF LOUISIANA, ET AL. and UNKNOWN OWNERS, DEFENDANTS

BODCAW COMPANY, DEFENDANT-APPELLEE
CROSS-APPELLANT

*Appeals from the United States District Court for the Western District of Louisiana*

Before COWEN *, GOLDBERG and AINSWORTH, Circuit Judges

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court

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* Senior Judge of the United States Court of Claims, sitting by designation.

for the Western District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and reversed in part; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that each party bear their own costs on appeal in this Court.

June 1, 1978

COWEN, Senior Judge, concurring in part and dissenting in part.



**APPENDIX C**

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

Civil Action No. 16,596

UNITED STATES OF AMERICA

*vs.*

1,380.09 ACRES OF LAND, MORE OR LESS, SITUATED IN CALDWELL PARISH, STATE OF LOUISIANA, and BODCAW COMPANY, ET AL., and UNKNOWN OTHERS

## AMENDED JUDGMENT

This cause coming on for trial at Monroe, Louisiana, on January 29, 1975, the Plaintiff appearing by and through Messrs. Gerald T. Levin, H. David Barr and Levin H. Harris, Assistant United States Attorneys, and the Defendant, Bodcaw Company, appearing by the firm of Shotwell, Brown & Sperry, by Messrs. Burt W. Sperry and L. Michael Ashbrook, its Attorneys; the jury was thereupon duly impaneled and sworn to try the issue of just compensation in the above entitled case, the Defendant assuming the burden of proof, at which time trial was had before said jury, witnesses sworn and testified, arguments had and instructions as to the law given by the Court; whereupon on the 31st day of January, 1975, the jury did retire for deliberation and after deliberating did on the same day return into Court a

verdict in favor of Defendant, Bodcaw Company, in the amount of $146,206.00, as just compensation for the property taken. The jury found no betterment to the Defendant's remaining property by virtue of the improvements planned by Plaintiff.

It further appearing from the record in this action that on March 18, 1971 Plaintiff instituted this condemnation proceeding by filing the complaint and declaration of taking, and deposited in the registry of this Court the sum of $99,650.00 as just compensation for the taking of the lands set out in the declaration of taking and complaint in combination filed herein.

It further appearing from the record in this matter that Defendant, Bodcaw Company, filed a motion to have its appraisal costs and expert witness fees assessed against Plaintiff. The Court having considered the Memorandum of Authorities filed by Plaintiff and Defendant, rendered written reasons for judgment dated and filed March 14, 1975 sustaining Defendant, Bodcaw Company's motion to assess its appraisal costs and expert witness fees in the amount of $20,512.50 against the Plaintiff, United States of America.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. Defendant, Bodcaw Company, is the former owner of the property taken by this condemnation proceeding and fully set out in the complaint for condemnation and declaration of taking filed March



18, 1971 and as such is entitled to the just compensation awarded for the taking of the land by the Plaintiff, United States of America, in the sum hereinafter set forth.

2. The just compensation due Bodcaw Company from the Plaintiff, United States of America, for the taking of the lands owned by Bodcaw Company and set out in the complaint in condemnation is ONE HUNDRED FORTY SIX THOUSAND TWO HUNDRED AND SIX AND NO/100 ($146,206.00) DOLLARS; toward payment of this compensation the Plaintiff, United States of America, has heretofore deposited NINETY NINE THOUSAND SIX HUNDRED FIFTY AND NO/100 ($99,650.00) DOLLARS in the registry of this Court as estimated just compensation for the taking of Defendant, Bodcaw Company's lands with the filing of the declaration of taking, which sum Defendant, Bodcaw Company, has withdrawn from the registry of the court on July 29, 1971; consequently, Plaintiff, United States of America, must deposit in the registry of this Court a deficiency sum in the amount of FORTY SIX THOUSAND FIVE HUNDRED FIFTY SIX AND NO/100 ($46,556.00) DOLLARS.

3. In addition to the just compensation awarded Defendant, Bodcaw Company, in paragraph 2 above, the Plaintiff, United States of America, shall pay the Defendant, Bodcaw Company, interest at the rate of six percent (6%) per annum on the principal deficiency sum of FORTY SIX THOUSAND FIVE HUNDRED FIFTY SIX AND NO/100 ($46,556.00) DOLLARS from March 18, 1971 until the date that

such deficiency sum is deposited into the registry of this Court, at which time interest shall cease entirely.

4. In addition to the just compensation awarded Defendant, Bodcaw Company, in paragraph 2 above, the Plaintiff, United States of America, shall pay the defendant, Bodcaw Company, TWENTY THOUSAND FIVE HUNDRED TWELVE AND 50/100 ($20,512.50) DOLLARS for expenses incurred in appraisal costs and expert witness fees.

DATED at Shreveport, Louisiana, this 23rd day of June, 1975.

/s/ Tom Stagg
District Judge

APPROVED as to form and content:

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## APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

C. A. No. 16,596

UNITED STATES OF AMERICA

*versus*

1,380.09 ACRES OF LAND, MORE OR LESS, SITUATED IN CALDWELL PARISH, STATE OF LOUISIANA, and BODCAW COMPANY, ET AL. and UNKNOWN OWNERS

## RULING ON MOTION

A condemnation proceeding was instituted by the United States of America against defendant Bodcaw Company, on March 18, 1971 by the filing of a complaint and declaration of taking. On the same day, Plaintiff deposited into the registry of the Court, as estimated just compensation for the taking, the sum of $99,650. Defendant took the position that the money deposited did not constitute a just compensation.

The action was tried before a jury on the issue of just compensation, and on January 31, 1975 the jury rendered a decision in favor of defendant in the amount of $146,201.11, as just compensation for the property taken. The jury found no betterment to the defendant's remaining property by virtue of the improvements planned by plaintiff.

As a result of the condemnation, defendant Bodcaw Company was required to employ appraisers and expert witnesses in order to establish the amount of just compensation to which it was entitled and to defend against plaintiff's contention of betterment. This employment resulted in the incurrence of appraisal costs and expert witness fees in the amount of $20,512.50.[1] Presently before the Court is a motion on behalf of Bodcaw Company to have these appraisal costs and expert witness fees assessed against plaintiff.

This question has previously been presented to and answered by the Fifth Circuit Court of Appeals and by the United States District Court for the Western District of Louisiana. In *United States* v. *71.29 Acres of Land, More or Less, in Catahoula, et al Parishes*, 376 F. Supp. 1221 (W.D.La. 1974), the Court stated:

> "We conclude, accordingly, that as a matter of equity, and constitutional 'just compensation', the property owners here are entitled to reimbursement of their appraisal costs and fees, as evidenced and stipulated." 376 F.Supp. 1221 at 1227.

The holdings of the Fifth Circuit are to the same effect. *United States* v. *Lee*, 360 F.2d 449 (1966) and *Henning* v. *Lake Charles Harbor and Terminal District*, 387 F.2d 264 (1968).

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[1] See Exhibits "A", "B" and "C", attached to defendant's motion.



Of course, the landowners are entitled only to a reasonable award of appraisal costs and expert witness fees. However, plaintiff has not challenged the reasonableness of the amounts shown by the defendant's exhibits,[2] and this Court does not find the amounts unreasonable. Accordingly, the motion on behalf of Bodcaw Company to assess its appraisal costs and expert witness fees against the United States is hereby granted.

Defendant is hereby ordered to submit to this Court a judgment approved as to form by the plaintiff and consistent with the foregoing.

THUS DONE AND SIGNED in Chambers at Shreveport, Louisiana, this 14th day of March, 1975.

TOM STAGG
United States District Judge

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[2] Footnote 1, *supra*.

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SUPREME COURT OF THE UNITED STATES

DOCKET NO. 78-551

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UNITED STATES OF AMERICA,

Petitioner,

VERSUS

BODCAW COMPANY,

Respondent.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

QUESTION PRESENTED

BODCAW COMPANY submits to the Court that the question presented is significantly narrower than that stated in the petition for a writ of certiorari in this case, and is more accurately stated as follows:

In a case in which the party seeking to take property by condemnation has breached its duty to determine in good faith the amount of just compensation due, may a federal district court award the owner of the land taken the cost of appraising the land as an

element of just compensation guaranteed by the Fifth Amendment?

## CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the United States Constitution provides in pertinent part:

> "...nor shall any person...be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

## STATEMENT OF THE FACTS

The Petitioner's statement of the facts in its petition is essentially accurate, but omits one critical fact. The United States recognized that the Fifth Circuit's decision in this case was made primarily because

> "'The land taken by the Government was not of such character that accurate estimates of value easily could be made'; because the Government had failed to conduct an onsite appraisal of the property until well after the suit was filed; and because the amount deposited by the Government into the Court Registry - $99,650 was more than $45,000 less than the sum



> awarded by the jury." (Page 4 of the petition for writ of certiorari.)

The critical fact which is omitted is the fact that not only did the Government fail to conduct an onsite appraisal of the property until well after the suit was filed, but also that at the trial of this case the Government never introduced any evidence of the value of the property which was based upon an onsite appraisal. Therefore, the only evidence regarding the value of the property which was based upon an actual onsite appraisal of the property was introduced by Bodcaw Company, which had incurred the expense of obtaining those appraisals.

## REASONS FOR DENYING THE PETITION

The Government asserts three reasons for its contention that this Court should grant a writ of certiorari in this case. The Government's first contention is that the decision of the Court of Appeals is contrary to this Court's decision in Dohany v. Rogers, 281 U.S. 362 (1930). The second is an alleged substantial impact of the case on federal land acquisition, with the Government asserting that this case is not in fact unusual as held by the Fifth Circuit. Finally the Government contends that the Fifth Circuit decision "reflects a fundamental misconception of the scope of the Just Compensation Clause of the Fifth Amendment."

(Petition for writ of certiorati, page 13.)

1.

The Decision Of The Fifth Circuit Is Not Contrary To Dohany v. Rogers.

It is submitted that the principle of just compensation contemplates an actual payment of compensation prior to the taking of property, and not merely the opportunity for the property owner to litigate his claim through the courts to determine the amount of compensation due. This principle was well stated in Section 812 of Lewis on Eminent Domain, 3rd Ed. as follows:

> "It seems to us that courts should be guided by the following principles and consideration in the matter of costs: By the constitution the owner is entitled to just compensation for his property taken for public use. He is entitled to receive this compensation before his property is taken or his possession disturbed. If the parties cannot agree upon the amount, it must be ascertained in the manner provided by law. As the property cannot be taken until the compensation is paid, and as it cannot be paid until it is ascertained, the duty of ascertaining the amount is necessarily cast upon the party seeking to condemn the property, and he should pay all the expenses which attach to



> the process. Any law which casts this burden upon the owner should, in our opinion, be held to be unconstitutional." (Emphasis added.)

In Nichols, the Law of Eminent Domain, (Rev. 3rd Ed.), Vol 4A, Sect. 14.249, at page 351, the author observed that:

> "The owner of land taken by eminent domain stands in a far different position from a defendant in an ordinary suit. The latter has ordinarily brought the trouble upon himself, if he is liable at all, by breaking a contract or committing a tort, and it is only just that he should pay the costs of the legal proceedings. Condemnation proceedings, on the other hand, are brought against a man because he happens to own available land. If a decree of condemnation is finally entered, even after a contest on damages only, it is, in a sense, a judgment in favor of the condemnor and consequently against the owner, although the latter's contention in respect to damage may have prevailed. There would be no justice in making the owner pay the costs of determining the compensation to which he is entitled by the constitution and, in fact, to do so would deprive him of his constitutional right to full compensation for his land ..." (Emphasis added.)

The Government on page 11 of its petition asserts that "it is required to appraise the property before it initiates negotiations for purchase" citing the Court to 42 U.S.C. 4651(2) the actual text of that statutory provision provides that:

> "(2) Real property shall be appraised before the initiation of negotiation, and the owner or his designated representative shall be given an opportunity to accompany the appraiser during his inspection of the property." (Emphasis added.)

Therefore, the statute obviously contemplates an actual onsite inspection of the property so that it may be appraised in accordance with the prevailing standards of the profession. Such an onsite inspection of the property was never made prior to the institution of this suit, and in fact the Government did not offer into evidence any appraisal of the property which was based upon an actual onsite inspection of the property in this case.

The decision rendered by the Fifth Circuit in this case does not conflict with this Court's decision in Dohany. It was recognized by both the Trial and Appellate Courts that litigation expenses are generally not allowable in condemnation proceedings, and Bodcaw does not seek general expenses of litigation in this case. The principle for which this case stands, as well as the case



of United States v. Lee, 360 F.2d 449 (U.S. App. 5th Cir., 1966) is simply that when the Government breaches its duty to make a good faith determination of the extent and value of the property taken prior to institution of suit and thereby forces the landowner to take that burden upon himself, the landowner will be awarded reimbursement for those expenditures. As stated in the Lee case (involving the cost of a survey) at page 452,

> "The granting of the cost of the survey involved here to the Appellees, however, does not require any departure from the law as to costs to be borne by the Government. When the Government condemns part of a landowner's property by metes and bounds, the burden should be on the Government to determine correctly the acreage actually enclosed by those metes and bounds. When the Government decides to ascertain the actual acreage being taken by means other than a survey on the ground, and the condemnee is put to the expense of showing the correct acreage being taken, it would be a violation of the Constitution to make him bear the cost of such survey, especially when the Government is put on notice that the acreage they claim to be taking is less than what is actually being condemned. To hold otherwise would be to

deprive a landowner of his property without due process of law."

Therefore, the holding in this case, like the holding in the Lee case, is not contrary to the principle announced in Dohany. This is illustrated by the fact that the Fifth Circuit in this case has allowed only recovery for the actual cost of obtaining the appraisal, and specifically denied recovery of the expert witness fees of the same appraisers at trial.

2.

The Decision Of The Fifth Circuit Will Not Have A Substantial Impact On Federal Land Acquisitions

The United States contends that the condemnation proceeding in this case is not notably different from the vast majority of litigated condemnation suits since there is frequently a significant difference of opinion regarding the amount of compensation due and expert witnesses regularly testified to different values of property at trial. The assertion that this case is not unusual is simply untrue. This case is not the usual situation in which two or more expert witnesses have made an actual inspection and evaluation of the property and have, within the limits of an acceptable high and low range of values, reached different conclusions based upon independent professional judgment. It is in fact a case in which the Government made no onsite



appraisal whatsoever prior to institution of the suit, and did not present any evidence at trial based upon an actual onsite appraisal.

In its attempt to illustrate the alleged substantial effect on federal land acquisition, the United States cited this Court to the case of United States v. 5,553.80 Acres in Concordia Parish, Louisiana (Angelina Plantation Farm) (W.D.La., No. 77-0491) (erroneously reported as being Docket No. 77-0441 at footnote 10 of page 12 of the petition for writ of certiorari). Bodcaw submits to the Court that it is significant (or at the very least a remarkable coincidence) that the Lee case, this case, and the Angelina Plantation Farm case, all involve the Corps of Engineers as the expropriating government agency. (The Lee case involving their failure and subsequent refusal to conduct on onsite survey, and this case and the Angelina case involving their refusal to conduct an onsite appraisal of the property at issue prior to commencement of expropriation proceedings.) Although the Lee case was decided prior to the enactment of U.S.C. 42:4651, both this case and the Angelina case were commenced subsequent to its enactment, and the Corps of Engineers could easily have avoided the result reached by the Fifth Circuit in this case and by the trial judge in both this case and the Angelina case simply by complying with the provisions of that statute. Had they done so, the constitutional provision on which the decision

of the Fifth Circuit and the trial court in this case was based would not have been violated. In fact, compliance with the Uniform Real Property Acquisition Policy set forth in that statute might have avoided the litigation entirely.

3.

The Decision Of The Fifth Circuit Correctly Applies the Fifth Amendment Of The United States Constitution

Finally, the Government contends that the Fifth Circuit misconstrued the meaning of just compensation since that principle is "for the property and not to the owner" (page 14 of the petition for writ of certiorari). Amplifying that asserted principle, the Government states on page 14 of the petition that

> "The owner is to be put into as good a position pecuniariiy as if his property had not been taken, but only in the sense that he must receive the full and fair market value of the property interest taken at the time of the taking." (Emphasis added.)

The time of the taking is not only the time at which the property is to be valued for the purposes of just compensation (because of possible increases or decreases in value), but is also the time at which just compensation must be paid. If the expropriating authority



fails to make an onsite appraisal of the value of the property in accordance with the prevailing standards and practices of that profession it is impossible for the United States to deposit just compensation into the Registry of the Court at the time the suit is filed. In this regard, the Court is again referred to the authorities quoted in Section 1 of this brief. It is the failure of the Government to fulfill its obligation to determine the value of the property in good faith which constitutionally compels the award of appraisal expenses to the property owner since he is bearing the cost of fulfilling an obligation of the expropriating authority.

The Government, still characterizing the appraisal fees awarded in this case as costs and expenses of litigation states that any change of policy should be made by Congress, not by the Judiciary. It is submitted that the decision in this case, as in United States v. Lee was not made on the basis of judicial policy, but rather upon constitutional compulsion, and the decision in this case is consistent with the public policy of the United States expressed in U.S.C. 42:4651(2).

CONCLUSION

The result reached by the United States Court of Appeals for the Fifth Circuit is correct, and a writ of certiorari in this case should be denied.

The decision in the lower courts was based upon the trial judge's extensive knowledge of the case and the Fifth Circuit's careful consideration of the evidence, briefs and oral arguments. If this Court should decide that further review is necessary, the summary reversal suggested by the United States is particularly inappropriate.

Respectfully submitted,

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I, GEORGE WEAR, JR., one of the attorneys for Bodcaw Company, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 5th day of December, 1978 I served copies of the foregoing Brief In Opposition To Petition For Writ of Certiorari, on the United States of America, Petitioner, by mailing a copy thereof, postage prepaid, to Wade H. McCree, Jr., Sanford Sagalkin, William C. Bryson, Raymond N. Zagone, Jacques B. Gelin and Anne S. Almy, Department of Justice, Washington, D.C. 20530, its attorneys of record.

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No. 78-551

# In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

*v.*

BODCAW COMPANY

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## REPLY MEMORANDUM FOR THE UNITED STATES

WADE H. MCCREE, JR.
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*

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## REPLY MEMORANDUM FOR THE UNITED STATES

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1. Respondent is in error in stating (Br. in Op. 3, 6, 8-9, 11) that the government did not make an on-site inspection and appraisal of the property until after the suit was filed, and respondent also errs in stating (Br. in Op. 3, 6, 8-9, 11) that the government did not introduce at the trial any evidence of the value of the property that was based on an on-site appraisal.

a. The suit was filed in 1971 and came to trial in 1975 (Pet. App. 15a-16a). At the trial, John W. Bowen, Jr., the government appraiser, testified as follows (Tr. 483-484):

> Q: Have you made a physical inspection of the Bodcaw property?
>
> A: Yes, I have. I reviewed the original appraisal reports, which were made on the Bodcaw properties in the beginning of the late 1960's. * * * [W]e began appraisals on the Bodcaw property in each one, the

late 1960's. Then we continued the appraisals through about 1969.

I made an appraisal myself in 1974 of the property involved.

Q: And you went on to the property at that time?

A: That is right.

Consistent with Bowen's testimony, and contrary to respondent's assertion, appraisals for negotiation purposes began in 1967 and ended in 1970.[1] The on-site inspection by Bowen in 1974 was made for trial purposes.

This is a typical pattern in land acquisitions, and, contrary to respondent's suggestion, it is in no way inequitable. As we stated in our petition (Pet. 9-11), when cases go to trial the government frequently relies on a fresh appraisal made shortly before trial. The expert who conducted the original, pre-negotiation appraisal may be unavailable to testify, pretrial rulings may alter the assumptions on which the original appraisal was made, or the government may conclude that a more current appraisal would be more persuasive at trial. The government here did conduct on-site inspections and appraisals for negotiation purposes before the suit was filed, and there was nothing unusual or unfair about its subsequently conducting a new inspection and appraisal shortly before the trial.

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[1]Bowen's testimony concerning the appraisals made in the late 1960's refers to valuations of the property made by other government appraisers. The records of the Corps of Engineers reflect that the property was appraised, following on-site inspections, by two Corps of Engineers appraisers in 1967 and 1968. These appraisals were updated by the same two appraisers in 1970. See also Tr. 555-556, where Bowen, on cross-examination, testified to appraisals, in which he assisted, in 1967, 1968, and 1969.

Respondent's suggestion (Br. in Opp. 6, 9-10) that the government violated 42 U.S.C. 4651(2) is incorrect, since that statute was not enacted until 1971, after the time that the pre-suit appraisals were conducted.



b. The government's evidence at the trial did include evidence of the value of the property that was based on an on-site appraisal. The witness Bowen, who had made an on-site inspection in 1974 in connection with his appraisal at that time (Tr. 483-484, quoted page 2, *supra*), testified to the value of the property on the basis of his inspection and appraisal. Bowen first described in detail his "physical inspection" of the property in 1974.[2] He then described the property itself (Tr. 489-493), and went on to describe the properties involved in some 20 sales that he considered comparable (Tr. 503-525). In summarizing his appraisal process, he stated (Tr. 527):

> I inspected the property and I inspected the sales, I compared the sales as to its highest use and its comparability so that I could give an indication as to the value of the sales. This would be as near as possible in time, location, having similar soils, similar characteristics, elevations and flood habits. Each sale was compared to the subject property on an overall basis. * * *

On this basis, Bowen testified to his estimates of the value of the property before and after the taking (Tr. 547).

2. Respondent also errs in its reliance on two treatises on eminent domain law (Br. in Op. 4-5). The excerpt from 4A Nichols, *Eminent Domain* § 14.249, at 351 (3d ed. 1977), merely states the well established principle that ordinarily costs may not be assessed against a landowner in an eminent domain proceeding. In a portion of that discussion not quoted by respondent, the treatise points

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[2]*E.g.* (Tr. 488): "I looked at the entire property in this manner to estimate the amount of timber that was in the right-of-way, also to see if there were any improvements in the right-of-way. This was also to see what kinds of lands were there, the type of timber that was grown on the lands, the soil, the drainage probiems, the drainage characteristics of the land or the drainage characteristics of the lands, the contour of the land connected with this. * * *"

out that this is a corollary of the principle that costs may not be awarded to either side in an eminent domain action absent specific statutory authorization. *Id.* at 351-352. This principle reflects the governing federal law. See Fed. R. Civ. P. 71A(1); Advisory Committee Notes, 28 U.S.C., page 7844.

The excerpt from the 1909 edition of the Lewis treatise, 2 Lewis, *Eminent Domain*, § 812, at 1434-1435 (3d ed. 1909) (Br. in Opp. 4), states the writer's view that the condemnor should be required to "pay all the expenses" incident to determining just compensation in an eminent domain proceeding. Although the discussion of this point is not entirely clear, Lewis appears to have been referring to the costs of the condemnation proceeding itself rather than litigation expenses incurred by landowners. See *id.* at 1435 n.6. If the writer meant to refer to expenses such as appraisal fees, however, this Court subsequently rejected that view in *Dohany* v. *Rogers*, 281 U.S. 362, 368 (1930), where it held that expenses are not embraced in just compensation for land taken by eminent domain.

3. Finally, respondent's characterization of the award in this case as resting on constitutional compulsion (Br. in Opp. 9-10, 11) helps demonstrate the degree to which the decision below departs from well-settled principles of just compensation. The cost of appraisal is simply not part of the value of the property, and just compensation is "for the property and not to the owner." *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 326 (1893). In suggesting that such costs are to be awarded as a matter of constitutional compulsion, respondent and the court of appeals are proposing a fundamentally different concept of just compensation, a concept that would have expansive impact on land condemnation actions by both federal and state governmental units.[3]

[3]Other condemnees have not read the Fifth Circuit's decision in this case narrowly. In the Southern District of Florida, the United States has filed approximately 7000 condemnation actions in connection with the establishment of the Big Cypress National Preserve, 16 U.S.C. 698f, and it is estimated than another 7000 actions will be filed in connection with that project in the future. Since the Fifth Circuit's decision in this case, the answers to the complaints in condemnation have regularly included a claim for appraisal costs.



For these reasons and for the reasons given in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
*Solicitor General*

DECEMBER 1978.